(10)

No. 91-1496

Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF AMICUS CURIAE LLOYD T. WHITAKER AS TRUSTEE FOR THE ESTATE OF OLYMPIA HOLDING CORPORATION f/k/a P*I*E NATIONWIDE, INC. IN SUPPORT OF RESPONDENTS

KIM D. MANN *
SHAWN, MANN & NIEDERMAYER
1850 M Street, N.W.
Washington, D.C. 20036
(202) 778-0680

GARDNER F. DAVIS
FOLEY & LARDNER
The Greenleaf Building
200 Laura Street
Jacksonville, FL 32201
(904) 359-2000

Counsel for Amicus Curiae

* Counsel of Record

September 2, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

61

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT	2
1. Scope of P*I*E's Operations	3
2. The Process of Liquidation	3
3. Moving Towards Successful Conclusion	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE STATUTORY SCHEME DOES NOT PERMIT AND THE EQUITIES DO NOT WARRANT CARVING OUT A BANKRUPTCY EXCEPTION TO THE FILED-RATE DOCTRINE	6
A. Congress Provided Reparations As The Exclusive Remedy For Shippers Charged Unreasonable Rates	8
B. Petitioners' Suggested Discrimination Against Insolvent Carriers Is Contrary To The Bankruptcy Code	9
C. Assuming *Arguendo* A Special Exception May Be Created, Bankruptcy Is Not A Justifiable Demarcation	11
II. THE BANKRUPTCY COURT HAS INHERENT POWER TO FASHION REMEDIES, CONSISTENT WITH THE FILED-RATE DOCTRINE, TO PROTECT ACCOUNT-DEBTORS	15
A. Code Setoff Provisions Are Inapplicable And Support *Cooper*'s Pay-Now Holding	15
B. Protections Consistent With The Filed-Rate Doctrine Abound	17
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Cooper v. *Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107 (4th Cir. 1991) 3, 9, 12, 15
In re Crysen/Montenay Energy Co., 902 F.2d 1098 (2d Cir. 1990) 10
Delta Traffic Service, Inc. v. *Georgia-Pacific Corp.*, 936 F.2d 64 (2d Cir. 1991) 17
In re Eastern Freight Ways, Inc., 577 F.2d 175 (2d Cir. 1978) 17
Fidelcor Business Credit Corp. v. *Dillard Department Stores*, No. 91-953-Civ-J-16 ..... 5, 12, 13
Goodrich Employees Federal Credit Union v. *Patterson*, 967 F.2d 505 (11th Cir. 1992) 15, 16, 17
In re Harbaugh, 99 B.R. 671 (Bankr. W.D. Pa. 1989) 15
ICC v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) 11
Keogh v. *Chicago & Northwestern R. Co.*, 260 U.S. 151 (1992) 7
*Lloyd T. Whitaker as Trustee for Olympia Holding Corp. f/k/a P*I*E Nationwide, Inc.* v. *Younkers, Inc.*, No. 91-448, 1992 WL 136415 (Bankr. M.D. Fla. June 15, 1992) 13
Lloyd T. Whitaker, Trustee for Olympia Holding Corp., et al. v. *ICC*, No. 92-2747, 6 Fla. L.W. B147 (June 8, 1992) 13
Maislin Industries, U.S., Inc. v. *Primary Steel, Inc.*, 110 S.Ct. 2759 (1990) ..... *passim*
Mohasco Industries, Inc. v. *Acme Fast Freight, Inc.*, 499 F.2d 1082 (5th Cir. 1974) 9
In re Morristown & Erie Ry., Inc., 885 F.2d 98 (3rd Cir. 1989) 17
*In re Olympia Holding Corporation a/k/a P*I*E Nationwide, Inc., et al.*, Case Nos. 90-4195-BKC-3P7 and 90-4223-BKC-3P7 2
In re Penn Central Transp. Co., 477 F.2d 841 (3rd Cir. 1973), *aff'd sub nom. United States Steel Corp.* v. *Trustees of Penn Central Transp. Co.*, 414 U.S. 885 (1973) 16

TABLE OF AUTHORITIES—Continued

Page

Southern Pacific Transp. Co. v. *City of San Antonio, Tex.*, 278 F.2d 266 (5th Cir. 1984) 7
T.I.M.E., Inc. v. *United States*, 359 U.S. 464 (1959) 9

ADMINISTRATIVE OPINIONS

Informal Procedures for Determining Reparations, 335 I.C.C. 403 (1969) 9
Payment of Rates & Charges—Penalty for Non-payment, 4 I.C.C.2d 340 (1988) 9

STATUTES

Act of Sept. 6, 1965, Pub. L. No. 89-170, 79 Stat. 651 (1965) (codified at 49 U.S.C. § 304a) 8
Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. § 101 *et seq.*) ..... *passim*
11 U.S.C. § 105(a) 17
11 U.S.C. § 361(3) 6, 17
11 U.S.C. § 362(a) 16
11 U.S.C. § 362(f) 6, 17
11 U.S.C. § 363(e) 6, 17
11 U.S.C. § 525(a) 10
11 U.S.C. § 541 10
11 U.S.C. § 541(a)(1) 10
11 U.S.C. § 541(a)(3) 10
11 U.S.C. § 553(a) 6, 15
28 U.S.C. § 1334(d) 10
Interstate Commerce Act, ch. 104, 24 Stat. 379 (1987) (codified as amended at 49 U.S.C. § 10101 *et seq.*) ..... *passim*
§ 11705(b) 8
§ 11705(b)(3) 5, 8
§ 11706(c)(2) 5, 8
§ 10708 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1496

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF AMICUS CURIAE LLOYD T. WHITAKER AS TRUSTEE FOR THE ESTATE OF OLYMPIA HOLDING CORPORATION f/k/a P*I*E NATIONWIDE, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae is Lloyd T. Whitaker as trustee for the estate of Olympia Holding Corporation f/k/a/ P*I*E Nationwide, Inc. ("*Amicus*" or "Trustee"). He files this brief in support of respondents Landon M. Cooper, trustee for Carolina Motor Express, Inc., *et al.*[1] P*I*E Nation-

[1] All parties have consented to the filing of this Brief pursuant to Rule 37.3 of the Rules of this Court. The parties' letters are filed with the Clerk of the Court.

wide (P*I*E) was a motor common carrier operating pursuant to the authority of the Interstate Commerce Commission ("ICC"). P*I*E filed a Chapter 11 petition under the Bankruptcy Code on October 16, 1990. Its motor carier operations continued, however, first as a debtor-in-possession and then under the auspices of *amicus* Lloyd T. Whitaker, appointed Chapter 11 trustee on December 26, 1990. The case was converted to Chapter 7 on March 11, 1991, and *amicus* was appointed Chapter 7 trustee.

As with most bankrupt motor carriers, the principal asset of the estate of P*I*E is its accounts receivable, consisting primarily of "undercharge" claims against former shipper-customers of P*I*E. These claims arise when shippers fail or refuse to pay the lawful, legal rates P*I*E had published in tariffs duly filed with the ICC. Unlike respondent trustee for Cooper Motor Express, the Trustee for P*I*E estimates the estate's total undercharge claims will, if collected, satisfy P*I*E's secured and unsecured debt. More than 20,000 adversary proceedings are to be filed in the bankruptcy court to collect these undercharge claims.[2] Because the filed rate's alleged unreasonableness is the defense proffered by most shippers sued for refusing to pay the filed rate, often without regard to its legal or factual basis, *amicus* wishes to present his views to assist this Court in resolving the proper application of the filed-rate doctrine.

STATEMENT

The Trustee adopts the statement of the case appearing in opinion of the court of appeals (Pet. App. 2a-5a), as supplemented in the brief of respondents Langdon M.

[2] The main bankruptcy cases are jointly administered in Case Nos. 90-4195-BKC-3P7 and 90-4223-BKC-3P7 in *In re Olympia Holding Corporation a/k/a P*I*E Nationwide, Inc., et al.*, pending in the U.S. Bankruptcy Court in the Middle District of Florida, Jacksonville Division.

Cooper, trustee for Carolina Motor Express, Inc., *et al.* The Trustee does not believe the context in which the rate-reasonableness defense arose in *Cooper* v. *Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107 (4th Cir. 1991) ("*Cooper*"), now before this Court, is fairly representative of undercharge claims in general or of undercharge claims in bankruptcy cases in particular. The Trustee offers the following description of the bankruptcy case in which he serves to provide a broader perspective within which to evaluate the legal issues presented.

1. *Scope of P*I*E's Operations.* When P*I*E filed for protection from creditors on October 16, 1990, it was one of the nation's larger motor carriers. It employed 4500 persons nationwide and had annual operating revenues of $500,000,000. Its customer base was more than 300,000 shippers and receivers of general commodities. Driving its financial predicament were increasing pressures from powerful large shippers, such as those represented by *amici* National Industrial Transportation League, *et al.* ("NITL"), demanding extraordinary trade concessions. They exacted huge, often secret and illegal, discounts off the base rates P*I*E* charged other shippers as a condition to tendering freight P*I*E desperately needed to fill its trucks.

For 2½ months following the filing of its Chapter 11 petition, P*I*E continued motor carrier operations. Despite the protection of the bankruptcy court, its collections of receivables continued to fall faster than operating costs could be reduced. At the end of 1990, P*I*E closed its doors.

2. *The Process of Liquidation.* At termination of operations, P*I*E had not only a considerable secured debt owed to lenders, but its unsecured debt to creditors, including former employees and small trade vendors, exceeded $100,000,000. Unemployed workers are owed $7,800,000 in unpaid wages, accrued leave and vacation

benefits. P*I*E's liability to the union and its non-union employee pension plan and retirement program exceeds $60,000,000. Unpaid state and local taxes are approximately $17,600,000.

As part of the liquidation process of the estate's assets for the benefit of creditors, the Trustee audited the freight bills and invoices P*I*E had issued its shippers to determine whether P*I*E had billed and the shippers had paid all freight charges due and owing under the legal, filed tariffs of P*I*E and the provisions of the Interstate Commerce Act (the "Act"). The Trustee, on behalf of the estate, submitted (and is continuing to submit) balance due bills to shippers found to have failed to pay the legal, lawful filed rates. The balance due bills fall into three distinct categories. Some are for the difference between the duly filed rate and some other lower (but illegal or inapplicable) tariff or unfiled common or contract rate the shipper had originally paid ("undercharges"). Some are for the full amount of the lowest applicable filed rate ("original charges"), and some are for a combination of unpaid undercharges and original charges. Shippers that refuse to pay the balance due bills have found themselves defendants in adversary proceedings the Trustee has initiated in the bankruptcy court, the first of which was filed June 4, 1991.

3. *Moving Towards Successful Conclusion.* The liquidation process is far from complete, but prospects for a successful conclusion appear good. The Trustee's freight bill auditing procedures remain on-going; balance due bills continue to be issued; and hundreds of new adversary proceedings are filed each week. Approximately 10,000 have already been filed in the bankruptcy court,[3] and 10,000 more are expected.

[3] The main bankruptcy case in Jacksonville, FL is the venue of all adversary proceedings. One important case, brought outside the bankruptcy court in the name of P*I*E's principal secured creditor, is pending before U.S. District Court for the Middle District of Florida, Jacksonville Division in Case No. 91-953-Civ-J-16, *Fidelcor Business Credit Corp.* v. *Dillard Department Stores* ("*Dillard*").

The Trustee estimates the total undercharges of the estate exceed $200,000,000. If substantially all these claims are collected or if the current undercharges estimate is low and a smaller portion is collected, these liquidated undercharge assets, together with the collection of other types of claims and the proceeds from the sale of tangible assets,[4] are likely to be sufficient to satisfy fully the debts owed secured and unsecured creditors of P*I*E and to pay the administrative expenses of the estate.

SUMMARY OF ARGUMENT

1. Petitioners attack the very foundation of the Supreme Court's holding in *Maislin*. They would elevate the importance of reasonableness of rates over the filing and collection of published tariff rates. They reverse the "unless and until" condition attached to the obligation to collect the legal filed rate by requiring collection only *after* the ICC rules the challenged rate is reasonable.

2. Petitioners would destroy the statutory scheme for addressing excessive rates. Congress has provided reparations in §§ 11705(b)(3) and 11706(c)(2) of the Act as the exclusive procedure to attack the reasonableness of assessed rates after those rates have become effective and the shipments have moved. Petitioners would have this Court legislate an impermissible exception to the filed-rate doctrine, judicially recognizing the rate-unreasonableness defense to a collections action involving a bankrupt carrier.

3. The filed-rate doctrine exception petitioners would have this Court create specially for the undercharge claims of bankrupt carriers can not be reconciled with the Bankruptcy Code. It is discriminatory on its face in

[4] These non-undercharge revenue sources for the estate include, for example, collection of original charges, recovery of preferences, and sale of real estate, trucks, and terminal properties.

violation of section 553(a) of the Code. It assumes, without foundation, that insolvent carriers can not satisfy debt obligations to their creditors. If implemented, it virtually guarantees the failure of all insolvent carriers' efforts to continue operations under Chapter 11 reorganization. It elevates shippers that withhold payment to insolvent carriers to a superior competitive position vis-à-vis shippers that have paid the legal filed rate as required by law. It creates a shipper benefit or preference in the nature of an offset which the Code prohibits, thus by-passing express Code provisions, 11 U.S.C. §§ 361(3), 362(f), and 363(e), designed specifically to protect the interests of ostensible creditors when warranted.

ARGUMENT

I. THE STATUTORY SCHEME DOES NOT PERMIT AND THE EQUITIES DO NOT WARRANT CARVING OUT A BANKRUPTCY EXCEPTION TO THE FILED-RATE DOCTRINE

This case challenges the filed-rate doctrine, affirmed by this Court two years ago in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S.Ct. 2759 (1990). Contrary to *amici* NITL's self-serving recasting of this doctrine (*see* NITL Br. at 3, 9, 10, 11, and 23), this Court determined that "utterly central" to the Act is the requirement that motor carriers publish and file their rates in tariffs and charge and collect those rates, and no others. *Maislin*, 110 S.Ct. at 2766, 2768-70. That rates be "reasonable" is not the "core," "bedrock," or "cornerstone" of the Act.

Petitioners and their supporting *amici* contend this Court should carve out a special exception to the filed-rate doctrine for shippers asserting rate-reasonableness defenses in those instances involving motor carriers in bankruptcy as undercharge claimants. In that event, according to petitioners and their *amici*, the filed rate need not be collected, and thus the filed-rate doctrine not

enforced, unless and until the ICC subsequently determines in an adversary proceeding that the filed rate is not unreasonable.[5] This special exception is said to be necessary because bankrupt carriers will not, because of their insolvency, make reparations to shippers that have pain the filed rate and subsequently secure an ICC determination the filed rate is unreasonable.

As *amicus*, the Trustee advises the Court that Congress never intended to void or suspend, on "fairness" grounds, application of the filed-rate doctrine to motor carriers in bankruptcy. Congress did not excuse motor carriers in bankruptcy from the Act's mandate to collect their filed rates and to do so within the time frame the statute and ICC regulations have prescribed.[6] Congress did not create an exclusive reparations remedy just for those shippers doing busines with viable, operating carriers.

There are other fundamental reasons why this Court should refuse the invitation of petitioners and their *amici* to graft on to the filed-rate doctrine a bankruptcy exception. As proposed, it is discriminatory in its application, subject to serious abuses, and virtually impossible or impractical to create by judicial fiat. To the extent the exigencies of any specific motor carrier's bankruptcy case may require special protections for shippers challenging

---

[5] This theory of pay only *after* an ICC rate-reasonableness determination is exactly the opposite of the principle this Court embraced in *Maislin*. Citing *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 151, 163 (1992), this Court confirmed that in order to prevent discrimination, "*unless and until* suspended or set aside, this [published tariff] rate is made the legal rate for *all* purposes, as between carrier and shipper." (Emphasis added.) 110 S.Ct. at 2765-66. "Unless and until" is a vital concept of prerequisites and timing which petitioners' analysis of the filed-rate doctrine totally reverses.

[6] Sanctioning a delay in payment of the filed rate is tantamount to abetting a violation of the filed-rate doctrine. *Southern Pacific Transp. Co.* v. *City of San Antonio, Tex.*, 278 F.2d 266, 272-74 (5th Cir. 1984).

rate reasonableness in a reparations action, the bankruptcy courts have inherent discretionary power under the Bankruptcy Code and the Federal Rules of Civil Procedure to address those concerns and craft any necessary relief.

A. Congress Provided Reparations As The Exclusive Remedy For Shippers Charged Unreasonable Rates

The statutory scheme for challenging unreasonable rates provides two opportunities to seek relief from the ICC—one prior to the effective date of the rates and the movement of the traffic,[7] and the other subsequent to the rates' effective date and the traffic's movement.

A 1965 amendment to the Act, now 49 U.S.C. §§ 11705 (b)(3) and 11706(c)(2),[8] established for the first time a precise judicial reference procedure for shippers, damaged as a result of paying filed (and effective) rates ultimately found to be unreasonable, to recover reparations from motor carriers. This limited procedure is the only one Congress has made available for post-shipment challenges to assertedly excessive rates. It authorizes the courts to award reparations after the ICC has determined the rates in issue, which plaintiff- shippers have paid, are unreasonable.[9] Congress provided no other procedure.

---

[7] Congress, in 49 U.S.C. § 10708, authorized shippers to file petitions with the ICC to suspend and investigate any rate deemed unreasonable *before* the rate becomes effective. In the setting of undercharge claims, § 10708 is not a practical tool.

[8] Act of Sept. 6, 1965, Pub. L. No. 89-170, 79 Stat 651- 652 (1965) (codified as amended at 49 U.S.C. §§ 11705(b) and 11706(c)(2)).

[9] The shipper files a separate reparations action in the district court to recover damages for payment of unreasonable rates, and the court refers the rate-reasonableness issue to the ICC for its initial ruling. The referring court reviews the decision of the ICC and applies or rejects its holding. *See* original codification of the 1965 amendment at 49 U.S.C. § 304a, recodified in 1978 without substantive change, P.L. 95-473, 92 Stat. 1372, to eliminate repetition and to conform to modern usage. *Mohasco Industries, Inc.* v. *Acme Fast Freight, Inc.*, 499 F.2d 1082, 1084-85 (5th Cir. 1974) (the reparations remedy "provide[s] the sole and exclusive remedy for excessive charges").

The reparations section of the statute is Congress's response to the holding of this Court in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959). Four years after Congress amended the Act to provide this narrow remedy, the ICC itself confirmed the narrowness, precision, and exclusivity of the reparations remedy in *Informal Procedures for Determining Reparations*, 335 I.C.C. 403, 407-08, 412, 413 (1969). The ICC's own comprehensive decision interpreting the 1965 amendment and reviewing its legislative hisotry rejects the very approach petitioners and their *amici* urge upon this Court. The decision of the ICC fully supports the decision of the court of appeals in *Cooper*.[10]

B. Petitioners' Suggested Discrimination Against Insolvent Carriers Is Contrary To The Bankruptcy Code

Petitioners and their *amici* attempt to portray bankrupt carriers as a special case warranting judicial recognition of the rate-reasonableness defense to collection of the filed rate, a defense they implicitly concede is not applicable to operating carriers' undercharge claims. This

---

[10] The ICC has long enforced a similar pay-now mandate, reaffirmed most recently four years ago in *Payment of Rates & Charges —Penalty for Nonpayment*, 4 I.C.C.2d 340, 345 (1988):

> Of course, a shipper is not precluded from disputing the transportation rate and subsequently obtaining the discount rate. But it must first pay the bill by the date certain and then confer with the carrier about the rate and/or institute litigation for a refund. Stated differently, a shipper may not withhold payment of the discounted rate past the date certain because it disputes the assessed charges and expect to receive the discounted rate. Indeed it is a long-standing tenet of rates law before this agency that "holdouts" or set offs by shippers on future payments are not permitted. (Citations omitted.)

position can not be reconciled with the complex balancing of interests which the constitutionally mandated, congressionally established bankruptcy statute performs. Petitioners fail to consider the implications of their proposed dichotomy for the Bankruptcy Code (the "Code") and the delicate balancing of interests inherent in that statute.

The filing of a case in bankruptcy creates an "estate." 11 U.S.C. § 541. The estate is comprised of property, including "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), and includes "any interest in property that the trustee recovers" under the various sections of the Code. 11 U.S.C. § 541(a)(3). The Code gives the bankruptcy court "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(d). An undercharge action is deemed an asset or property of the estate of a bankrupt carrier. *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1101 (2d Cir. 1990).

The Code is thus fully implicated when petitioners and their *amici* advocate judicial creation of a new filed-rate doctrine corollary: shippers do not have to pay promptly the challenged filed rates of motor carriers in bankruptcy. Petitioners and their *amici* do not contend the courts should condone any delay under the filed-rate doctrine if the carrier publishing the challenged rate is not in bankruptcy. This disparity in treatment is inconsistent with the Code's overriding policy prohibiting discrimination against a debtor under the protection of the Code. 11 U.S.C. § 525(a). Although this Code provision prohibits governmental units, both federal and state, from discriminating against the bankrupt carriers, a judicially mandated exception to the filed-rate doctrine applicable solely to bankrupt carriers is on its face contrary to the clear intent of Congress.

Citing *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), *amici* attempt to justify this disparity by clinging to the ICC's inherent power "to fashion a remedy beyond its express [statutory] authority in order to further a legitimate statutory purpose . . ." (NITL Br. at 23). Whatever the parameters of this implied power, it does not extend to creation of a "remedy" that conflicts with the express non-discrimination provisions of the Code, the exclusive reparations remedy of the Act, and the filed-rate doctrine itself. *Compare Maislin*, 110 S.Ct. at 2770.

C. Assuming *Arguendo* A Special Exception May Be Created, Bankruptcy Is Not A Justifiable Demarcation

Petitioners and their *amici* urge this Court to establish a bright-line test for carving out the special exception to the filed-rate doctrine—filing a petition in bankruptcy. The mere filing of a bankruptcy petition is not a relevant or rational basis for creating the exception, and no other test is practicable, even assuming any exception is acceptable as a matter of law after *Maislin*.

The liquidation values of motor carriers' estates vary widely. Carolina Motor Express may represent a class of bankrupt carrier whose assets when liquidated are insufficient to satisfy all creditors of the estate. There are, however, other classes of bankrupt motor carriers of which the P*I*E estate appears to be representative where ample assets are available to satisfy all creditors under the priority provisions of the Code. A shipper that successfully pursues its reparations remedy against P*I*E and other similarly situated carriers under the statute does not necessarily receive a rate-reasonableness determination that has little or no practical effect because of the carrier's insolvency as petitioners and their *amici* allege (NITL Br. 16). Petitioners' central pay-later argument ignores this variable.

Not all motor carriers filing for protection under the bankruptcy laws are "defunct" and liquidate, although by definition they may be insolvent. P*I*E, while in Chapter 11, continued its trucking operations for some 2½ months before finally succumbing to the pressures of diminished revenues resulting from extreme difficulties in collecting its accounts receivables. Other motor carriers have been able to survive following their Chapter 11 petitions, performing viable operations while in reorganization and emerging from bankruptcy.[11] If the mere filing of the bankruptcy petition could trigger the availability of the rate-reasonableness defense, non-liquidating Chapter 11 carriers would be doomed to failure as they faced collection problems not encountered by their competitors. Shippers would have added incentive to stop making payments of transportation charges to carriers operating in Chapter 11 reorganization. Instead, they would simply contest all existing rates as unreasonably high, without regard to the merits of this assertion.[12] The drain on the carriers' cash flow at a time when credit is the tightest would place them at a significant, probably even fatal, competitive disadvantage. The sheer cost to the debtor-carrier to litigate these resulting claims and bogus "rate-reasonableness" defenses, as well as the prospects of an uncertain result many years later, may dictate accepting compromise settlements and thus reduced revenues, further exacerbating cash flow shrinkage.

P*I*E is itself the victim of massive shipper refusals to pay transportation charges for services P*I*E rendered while operating in Chapter 11 reorganization. For example, in *Dillard*, *supra* at n.3, plaintiff seeks to collect more than one million dollars in undercharges and orig-

[11] Most of today's larger commercial airlines represent such success stories.

[12] This is no mere theoretical possibility. See discussion of shippers Dillard and Younkers below. The Fourth Circuit correctly predicted this behavior. *Cooper*, 949 F.2d at 110.

inal charges for thousands of shipments P*I*E had transported for Dillard post-petition on which Dillard simply declined to make any payments (App. "A" at 1a). Dillard's unreasonable-rate defense persuaded the court to hold the entire case in abeyance and refer the issue to the ICC (App. "A" at 15a).[13] P*I*E's estate will not see any recovery for many years, if ever, based on the ICC's current disgraceful record.[14] More importantly, Dillard's competitors have had to pay full applicable filed rates for comparable transportation services and have had to pay them within the ICC's established credit period. To suggest shippers should be permitted to postpone filed-rate payments for years simply by asserting rate-reasonableness defenses because discrimination possibilities suddenly evaporate in a bankruptcy context is to defy reality.

Unlike the court in *Dillard*, the court in *Lloyd T. Whitaker as Trustee for Olympia Holding Corp. f/k/a P*I*E Nationwide, Inc.* v. *Younkers, Inc.*, No. 91-448, 1992 WL 136415 (Bankr. M.D. Fla. June 15, 1992), refused to refer Younkers' rate-reasonableness defense to the ICC when the shipper sought to block collection of the full filed rate.[15] Younkers, like Dillard, had elected not to

[13] *Amici* NITL (NITL Br. at n.6) is simply wrong on this point.

[14] The ICC has received approximately 200 court referrals of the rate-reasonableness issue since this Court's decision in *Maislin* more than two years ago. The ICC has not made a single rate-reasonableness determination in any one of these cases, and there is no prospect it intends to do so. *See* Affidavit of Don H. Norman, in evidence in *Lloyd T. Whitaker, Trustee for Olympia Holding Corp., et al. v. ICC*, No. 92-2747, 6 Fla. L.W. B147 (June 8, 1992) (App. "B" at 16a-17a).

[15] The *Younkers* court followed the holding of the Fourth Circuit in *Cooper*:

> The [Act] provides a procedure through which a shipper may challenge a filed rate and recover "reparations" for excessive amounts. The scheme does not provide for the use of the right to reparations as a defense. The sole and exclusive remedy

pay P*I*E anything for transportation services P*I*E rendered post-petition, forcing the Trustee to initiate an adversary proceeding to collect.

Petitioners and their *amici* argue that no harm occurs when shippers are excused indefinitely from paying the filed rate of a bankrupt carrier until the ICC acts on their rate-reasonableness defense. They ignore the advantage these shippers enjoy vis-à-vis their competitors that have obeyed the law, paying the applicable filed rates within the time frame prescribed in the carrier's tariffs and any relevant ICC credit period. If these competitors elect to challenge the reasonableness of the bankrupt carrier's rates post-payment and they prevail in their statutory reparations action, they become unsecured creditors of the estate. The self-help shippers that *amici* NITL represent do not have to endure this financial burden and risk as long as they couple their unilateral decisions not to pay with a rate-unreasonableness defense when sued.

Petitioners and their *amici* also fail to recognize the vagaries of the marketplace as hundreds, perhaps even thousands, of shippers file for bankruptcy protection themselves in the intervening years between the carrier's bankruptcy petition and the ICC's decision on the reasonableness of the rates. They thus may escape their payment obligations altogether.[16]

The bright-line test of petitioners and their *amici* can not accommodate the multifaceted, often subtle nuances of the market place. Rather than tampering with the filed-rate doctrine, *amicus* Trustee respectfully suggests the

---

provided is a post-payment challenge to the rate reasonableness accompanied by a request for reparations. (Citations omitted.) (App. "C" at 36a).

[16] The Trustee is discovering that hundreds of P*I*E's former customers to which balance-due bills have been submitted are no longer around. They have filed for bankruptcy protection or simply gone out of business, leaving unpaid transportation charges virtually uncollectible.

bankruptcy courts, with their intimate familiarity with the unique circumstances surrounding each bankruptcy case and each bankruptcy proceeding, are and should remain the proper forum to address any special protections to which an account-debtor may be entitled under the Code and the laws of interstate commerce.

II. THE BANKRUPTCY COURT HAS INHERENT POWER TO FASHION REMEDIES, CONSISTENT WITH THE FILED-RATE DOCTRINE, TO PROTECT ACCOUNT-DEBTORS

A. Code Setoff Provisions Are Inapplicable And Support *Cooper*'s Pay-Now Holding

Amici NITL cite the Code as support for their right to protect themselves by insisting on a rate-reasonableness determination prior to payment of the filed rate. They analogize their "right" to withhold rate payments to an alleged "right" under the Code, 11 U.S.C. § 553(a), to setoffs and recoupment (NITL Br. at 28). Based on this analogy, they argue a shipper that is both a creditor and debtor is not required, under the bankruptcy laws, to pay first and collect later, but "is entitled to set off the debt it owes against the debt it is owed . . . ." *Id.*

Recoupment is an equitable defense or remedy this Court specifically rejected in *Maislin* as unavailable in the filed-rate context, and bankruptcy does not create a right of setoff. Section 553(a) of the Code does not create that right, but merely preserves whatever right may exist under substantive law outside the bankruptcy context, and only then if all the conditions of section 553(a) are met and the court, in its sound discretion, grants the setoff. *Goodrich Employees Federal Credit Union* v. *Patterson*, 967 F.2d 505 (11th Cir. 1992); *In re Harbaugh*, 99 B.R. 671, 675 (Bankr. W.D. Pa. 1989), and cases cited therein.

In *Goodrich*, the 11th Circuit concluded the Credit Union's self-help action, freezing the debtors' account in order to protect its asserted right of setoff, violated the

automatic stay provisions of the Code, 11 U.S.C. § 362(a). The *Goodrich* court specifically rejected the same disappearance-of-assets rationale petitioners and *amici* proffer here. The Credit Union argued it was entitled to withhold funds to which the debtors were otherwise entitled because, if paid over, the Credit Union would be left with neither security for its claim nor other lawful means to protect its security interest.

First, the 11th Circuit determined the Credit Union wrongly presupposed it had a right of setoff when in fact none existed under state law. Likewise, NITL incorrectly presupposes a shipper's right to setoff against payment of the applicable filed rate whereas the Act provides for no such right,[17] and the courts have ruled none exists in the bankruptcy setting because of the preeminence of the filed-rate doctrine. *In re Penn Central Transportation Co.*, 477 F.2d 841, 844-45 (3rd Cir. 1973), *aff'd sub nom.* 414 U.S. 885 (1973).

Second, the 11th Circuit in *Goodrich* determined the Credit Union wrongly presupposed it had no other means to protect its asserted interest. Agreeing that, under the facts of that bankruptcy proceeding, payment of the funds owed to the debtors would leave the Credit Union with "an empty right" if the Credit Union's offset was subsequently determined to be valid, the court of appeals nevertheless refused to condone the creditor's actions. Instead, it chastised the Credit Union for failing to avail itself of alternatives available under the Code to protect the Credit Union from the risk of unavailability of funds to satisfy its later-determined valid right of setoff. Likewise, as discussed below, petitioners and their *amici* have several alternative means of protecting their asserted reparations rights without unilaterally withholding filed-rate payments due trustees. Petitioners fail to address those alternatives.

---

[17] This Court construed the Act as condemning any offset against the filed rate as a form of an illegal rebate, warranting severe civil penalties. *Maislin*, n.2.

B. Protections Consistent With The Filed-Rate Doctrine Abound: Petitioners Ignore Them

Congress, in enacting section 105 of the Code, 11 U.S.C. § 105(a), gave the bankruptcy courts broad equitable powers to modify their own orders and to craft remedial orders so as to further substantive provisions of the Code as long as such exercise is not inconsistent with the Code or applicable law. *In re Morristown & Erie Ry., Inc.*, 885 F.2d 98 (3rd Cir. 1989).

The bankruptcy court, with day-to-day supervision of the motor carrier's bankruptcy case, is well positioned to assess the size of the creditor's total claims, the value of the estate's assets, and the progress of the liquidation. Each case is different. If convinced a shipper or a group of shippers requires special protection because of the condition of the estate's collection efforts and given the nature of their claims against the estate and the estate's claims against that shipper or shipper group, the bankruptcy court may attach appropriate conditions to the payment of the filed rate. If necessary, it could, for example, require the trustee to take steps to preserve shipper payments of the filed rate, when received, pending final outcome of any reparations action the shipper initiates. *Compare In Re Eastern Freight Ways, Inc.*, 577 F.2d 175, 181-82 (2d Cir. 1978). It also could require the payments be placed directly into a special court registry or fund pending a decision from the ICC. *See Delta Traffic Service, Inc.* v. *Georgia-Pacific Corp.*, 936 F.2d 64 (2d Cir. 1991). In finding an automatic-stay violation in *Goodrich*, the court of appeals relied on the asserted creditor's failed use of a similar alternative to protect itself, citing sections 361(3), 362(f), and 363(e) of the Code as sources of the bankruptcy court's broad powers. None of these alternatives would, on its face, conflict with the filed-rate doctrine, but would be consistent with it. Petitioners and their *amici* fail to mention them.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

KIM D. MANN *
SHAWN, MANN & NIEDERMAYER
1850 M Street, N.W.
Washington, D.C. 20036
(202) 778-0680

GARDNER F. DAVIS
FOLEY & LARDNER
The Greenleaf Building
200 Laura Street
Jacksonville, FL 32201
(904) 359-2000

Counsel for Amicus Curiae

September 2, 1992 * Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 91-953-Civ-J-16

FIDELCOR BUSINESS CREDIT CORPORATION,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant.

ORDER

[Filed July 30, 1992]

This cause is before the Court on Plaintiff's motion for preliminary injunction (docket no. 35); Defendant Dillard Department Stores, Inc.'s (hereinafter "Dillard") motion for stay and referral to the Interstate Commerce Commission (hereinafter "ICC" or "Commission") (docket no. 46); Plaintiff's motion for order permitting Plaintiff to file a reply (docket no. 60); and, Dillard's motion for leave to file reply (docket no. 61). Timely responses have been filed.

I. Background and Procedural History

The facts as alleged by Plaintiff are as follows. P*I*E Nationwide, Inc., a now-bankrupt motor common carrier, transported thousands of shipments for Dillard in 1989 and 1990. Many of these shipments were transported pursuant to a P*I*E tariff on file at the Commission which required payment within sixty days as a condition to receiving a large discount. However, Dillard refused to pay for these shipments.

According to Plaintiff, within two weeks of the end of the sixty-day period for payment P*I*E rebilled Dillard

separately and individually for each of those shipments at the full undiscounted class rates. Again, Dillard failed to pay.

The remainder of Dillard's shipments in 1989 and 1990 were transported at a fifty-seven percent discount and paid on time by Diliard. However, Plaintiff later discovered that P*I*E's tariffs contained only a forty-seven percent discount for Dillard. Plaintiff then rebilled Dillard for the ten percent difference on these shipments, which Dillard refused to pay.

On October 16, 1990, Olympia Holding Corporation, formerly P*I*E Nationwide, Inc., filed a petition for relief under Chapter 11 of the Bankruptcy Code. As of the petition date, Olympia was principally engaged in the business of motor carrier transportation for its customers, and had pledged its accounts receivable to Plaintiff as security for more than $40 million in indebtedness to Plaintiff pursuant to certain loan agreements. Plaintiff was Olympia's principal pre-petition lender, and secured all pre-petition advances by liens and security interests on the assets of Olympia, including but not limited to P*I*E's accounts receivable.

On December 15, 1991, Olympia announced its decision to terminate its operations. Olympia terminated its operations in mid-January, 1991. Olympia's bankruptcy case was promptly converted from a case under Chapter 11 to a case under Chapter 7. As of January 30, 1991, Olympia owed Plaintiff in excess of $37 million pursuant to the aforementioned loan agreements. On March 24, 1991, the Bankruptcy Court granted Plaintiff relief from the automatic stay imposed by 11 U.S.C. § 362(a) and vacated the automatic stay to permit Plaintiff to collect freight charges from former customers of P*I*E (including Defendant Dillard).

Plaintiff filed this case on November 1, 1991, to collect allegedly unpaid freight charges from Defendant in ac-

cordance with applicable tariffs on file with the Commission. On February 19, 1992, Dillard filed a Complaint and Petition for Declaratory Order before the Commission seeking a disposition of issues raised by Plaintiff's Complaint in this case and by Defendant's answer and affirmative defenses. Specifically, Dillard asked the Commission to determine whether Fidelcor's attempt to collect loss of discount penalties violates the Commission's Credit Rules and/or is an unreasonable practice under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (hereinafter "Act"), and whether the higher rates sought to be collected by forfeiting the discounts are unjust and unreasonable under the Act. On April 1, 1992, the Commission instituted an investigation and ordered Plaintiff to show cause why a cease and desist order should not be issued prohibiting Plaintiff from collecting or attempting to collect more than previously billed discount rates on file with the Commission in violation of the Act and the rules and regulations promulgated thereunder. *See* ICC Decision, No. MC-C-30197 (April 1, 1992). Dillard's Petition is currently pending before the Commission.

Plaintiff's motion for preliminary injunction requests this Court to enjoin Dillard from further prosecuting or otherwise pursuing its Complaint and Petition for Declaratory Order filed before the Commission. Defendant's motion for stay and referral requests this Court to stay this case and refer the issues raised by Defendant's affirmative defenses under the Act to the Commission for determination. Specifically, Defendant requests that the following issues be referred: (1) whether Plaintiff's attempt to collect loss of discount forfeitures as penalties for late payment of freight bills violates the Commission's Credit Rules, 49 C.F.R. § 1320, and/or is an unreasonable practice under the Act; and, (2) whether the higher rates claimed, if applicable, are unreasonable under the Act.

II. Discussion

A.

This case involves two important concepts in the law regulating motor carriers—the doctrine of primary jurisdiction and the filed rate doctrine. The interaction of these two concepts, in tandem with the bankrupt status of a defunct motor carrier, will define the procedural framework by which this case will operate.

The statutory basis for the filed rate doctrine is set forth in the Interstate Commerce Act, which requires a motor common carrier to publish its rates in a tariff filed with the Commission. 49 U.S.C. § 10762. The Act imposes an obligation on the carrier to charge only those rates on file, *id.* § 10761, and prohibits a carrier from subjecting any shipper to unreasonable discrimination. *Id.* § 10741. Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See *id.* §§ 11902-11904.

The classic judicial statement of the filed rate doctrine is set forth in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 35 S. Ct. 494 (1915). In *Maxwell*, the Court stated:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Id. 237 U.S. at 97, 35 S. Ct. at 495.

This strict rule has been necessary to prevent carriers from intentionally misquoting rates to certain shippers as a means of offering discounts to favored shippers, thereby discriminating against less important shippers who are required to pay the higher filed rates. *See Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1230-31 (7th Cir. 1982). The United States Supreme Court recently relied on the filed rate doctrine to invalidate the Commission's policy of allowing shippers to maintain an "unreasonable practice" defense to a suit by a carrier to collect unpaid freight charges arising out of negotiated (but unfiled) rates. *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

The main exception to the filed rate doctrine is that "the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767; *see Maxwell*, 237 U.S. at 97, 35 S. Ct. at 495 (stating that the filed rate is the legal rate "unless it is found by the Commission to be unreasonable"). The Act gives shippers the right of reparations against carriers that charge unreasonable rates. 49 U.S.C. § 11705(b)(3) (stating that a "common carrier providing transportation or service . . . is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle."). A shipper may contest the reasonableness of a filed rate before or after the filing of the carrier's undercharge suit. *Id.* § 10708(a)(1) (stating that the Commission "may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately; on its own initiative or on application of an interested party when . . . a new individual or joint rate . . . is filed with Commission by a common carrier . . .").

B.

The doctrine of "primary jurisdiction" requires that:

> "issues of transportation policy which ought to be considered by the Commission in the interests of a

> uniform and expert administration of the regulatory scheme laid down the by Act" be submitted initially to the Commission for determination. Therefore, a district court trying a case under the Interstate Commerce Act must, if presented with such an issue, stay its proceedings and refer the case to the Commission.

City of New Orleans v. Southern Scrap Material, 704 F.2d 755, 758 (5th Cir. 1983) (*quoting ICC v. Atlantic Coast R.*, 383 U.S. 576, 579 (1966)). It is beyond dispute that the Commission has primary jurisdiction to determine whether filed rates are reasonable. *See Atlantis Express, Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529, 537 (8th Cir. 1992) (*citing United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 62-70, 77 S. Ct. 161, 164-68 (1956)). In addition, the Eleventh Circuit has held that the Commission has primary jurisdiction to determine whether a carrier *practice* is unreasonable under the Act, *see Seaboard System R.R., Inc. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986), "particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency . . . [and calls for] a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-05, 96 S. Ct. 1978, 1987 (1976). Moreover, when questions of construction and reasonableness of a tariff are "so intertwined that the same factors are determinative of both issues, then it is the Commission which must first pass on them." *Coca-Cola Co. v. Atchison, T. & S. Ry. Co.*, 608 F.2d 213, 220 (5th Cir. 1979) (*quoting Western Pac. R.R*, 352 US. at 69, 77 S.Ct. at 168).

C.

Both parties agree that issues of rate reasonableness are within the Commission's primary jurisdiction. However, Plaintiff contends that the filed rate doctrine requires that Defendant first pay the filed rates and then sue in district court for reparations, *see* 49 U.S.C. § 11705(b)(3), at which time the issue of rate reasonableness would be referred to the Commission. In contrast, Defendant contends that rate reasonableness may be raised as an affirmative defense to this lawsuit, and that the issue of rate reasonableness should be promptly referred to the Commission for resolution. With regard to the issue of whether Plaintiff's attempt to collect loss of discount penalties violates the Commission's credit rules or constitutes an unreasonable practice. Defendant contends that this issue should also be referred to the Commission, while Plaintiff contends that this issue is not referable.

The first question this Court must answer is whether any of these issues may be referred to the Commission at this time, or whether these issues may be referred to the Commission only after Dillard pays the filed rates and sues for reparations. The Supreme Court, in a case involving the United States as shipper, has held that rate unreasonableness may be raised as a defense in an action to collect rail freight undercharges. *Western Pacific*, 352 U.S. at 71-74, 77 S. Ct. at 168-71. However, because that case involved a unique factual situation with the United States as a shipper, some courts have been hesitant to extend the *Western Pacific* holding to situations involving private shippers. *See, e.g., Atlantis Express*, 955 F.2d at 537 n.14.

The recent decision by the Supreme Court in *Maislin* also provided clues as to the proper course of action. In *Maislin*, the Court reversed the Commission's negotiated rates policy and stated that:

> The ICC did not determine whether the tariff rates were unreasonable even though respondent requested such a determination. We therefore must assume, for purposes of our decision today, that the rates

were reasonable. *The issue of the reasonableness of the tariff rates is open for exploration on remand.*

110 S. Ct. at 2767 n.10 (emphasis added).

Several appellate courts have interpreted this footnote to approve of referral to the Commission where a shipper raises a rate unreasonableness defense to a collection suit. *See, e.g., Advance United Expressways, Inc. v. Eastman Kodak Co.*, No. 91-1320, slip op. at 10 (5th Cir. June 26, 1992). The *Maislin* Court also noted without disapproval the district court's referral of the matter to the Commission. *Maislin*, 110 S. Ct. at 2760.

The circuit courts are split on whether a shipper can raise the unreasonableness of filed rates as a defense in an action to collect undercharges and obtain immediate referral of the issue to the Commission prior to paying the filed rates. The vast majority of circuits have held that rate unreasonableness is a valid defense and that, as a general rule, stay and referral to the Commission is appropriate. *See Advance United*, slip. op. at 10 (5th Cir. 1992); *Atlantis Express*, 955 F.2d at 536 (holding that rate unreasonableness is a valid defense where the parties agreed to a negotiated rate and the shipper no longer has an adequate reparations remedy due to the carrier's bankruptcy); *Duffy v. BMC Indus.*, 938 F.2d 353, 357 (2d Cir. 1991) (allowing shipper to assert an unreasonableness defense when two-year statute of limitations on reparations action had expired); *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip op. at 3-4 [914 F.2d 241 (Table)] (3d Cir. Aug. 14, 1990) (mem.) (recognizing an unreasonableness defense, but denying referral where the shipper failed to introduce any evidence of unreasonableness); *Delta Traffic Serv. v. Transtop, Inc.*, 902 F.2d 101, 104-06 (1st Cir. 1990); *Western Transp. Co.*, 682 F.2d at 1231-32 (7th Cir. 1982). Only one circuit has held that shippers must pay the freight undercharges and then challenge the reasonableness of the filed rates in a separate reparations action before the

Commission. *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107, 110 (4th Cir. 1991); *see also Supreme Beef Processors, Inc. v. Yaquinto (In re Caravan Refrig. Cargo, Inc.)*, 864 F.2d 388 (5th Cir. 1989); *but see Advance United, supra* (effectively overruling *Supreme Beef*). In *Cooper*, the Fourth Circuit reasoned that referral to the Commission of undercharge cases involving rate unreasonableness defenses would frustrate the operation of the filed rate doctrine by providing "a strong incentive for shippers routinely to contest the validity of the carrier's rates in order to delay paying the carrier's filed rate." *Cooper*, 949 F.2d at 110. The Supreme Court has granted certiorari and will review the *Cooper* decision. *Reiter v. Cooper*, 112 S. Ct. 1934 (1992).

This Court agrees with the majority view and holds that rate unreasonableness is a valid defense which may be raised by a shipper in a carrier's suit for undercharges. Furthermore, this issue may be referred to the Commission in appropriate circumstances. This result is fully consistent with the language and structure of the Act. Although the Act provides a reparations remedy to shippers who have already paid the filed rate, nothing in the Act expressly forbids the unreasonableness defense asserted here. Moreover, the plain language of 49 U.S.C. § 10708(a)(1) authorizes a shipper to contest the reasonableness of a filed rate at any time. *Id.* (stating that the Commission "may begin a proceeding to determine the lawfulness of a proposed rate . . . on application of an interested party" when a new rate is filed); *see Cooper*, 949 F.2d at 110.

The Court also finds that referral of the rate reasonableness issue to the Commission is not inconsistent with the filed rate doctrine. The overriding purpose of the doctrine is to prevent a carrier from engaging in price discrimination among shippers. *See Maislin*, 110 S. Ct. at 2768. It is difficult to see how this purpose is frus-

trated by stay and referral where the carrier is bankrupt, since there is no possibility of a defunct carrier engaging in illegal price discrimination among shippers while the Commission determines the referred issues. *See Atlantis Express*, 955 F.2d at 536. The Commission itself has agreed with this analysis in a recent policy statement and has concluded that rate unreasonableness is a defense where the carrier is bankrupt. *See* ICC, Ex Parte No. MC-177 (Sub-No. 2), *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 68 (Aug. 15, 1991) (stating that "[i]mmediate payment is not needed to achieve the goals of the filed rate doctrine. . . . There is no possibility of a defunct carrier unlawfully discriminating for or against any shippers while the rate reasonableness challenge is being resolved.").

Finally, it is highly important that this case involves a bankrupt carrier. Because of P*I*E's bankruptcy, a shipper who is forced to pay now and sue for reparations later will be left without an adequate reparations remedy. *See Atlantis Express*, 955 F.2d at 536. Perhaps when the collection suit is brought by a viable carrier, the proper course would be to require the shipper to pay the filed rate and then sue for reparations. However, when the carrier is bankrupt, denying a shipper's request to refer a rate reasonableness defense to the Commission would essentially deprive that shipper of the reparations remedy afforded by the Act, a result that is not compelled by the Act or by judicial formulations of the filed rate doctrine. *See Atlantis Express*, 955 F.2d at 536.

D.

Having decided that the filed rate doctrine does not bar referral to the Commission in appropriate circumstances, the Court must now determine whether Dillard has raised issues which require referral. Unquestionably, Dillard's defense of rate unreasonableness is an issue within the

Commission's primary jurisdiction which requires referral. However, a shipper must make a threshold showing that the Commission could find the filed rates unreasonable; a mere conclusory assertion of unreasonableness is insufficient. *See id.* at 537. Relevant factors in determining reasonableness include: (1) a comparison of the challenged rates with other competitors' rates for the same traffic; (2) whether the rates paid by the shipper were competitive; and, (3) whether the filed rates sought to be imposed were above prevailing market rates. *See id.*

In this case, Dillard has alleged (by the affidavit of the manager of Dillard's freight payment department, Mr. Tim Walker) that it received discounted rates from other carriers during the relevant period of up to sixty percent, in comparison to the fifty-seven percent discount originally billed by P*I*E. In addition, Dillard alleges that the undiscounted rates are grossly unreasonable in that such rates would have given P*I*E an excessive profit margin of seven times the normal operating margin in the motor carrier industry, a retun on equity of 259%. The Cout finds that Dillard has made a sufficient threshold showing of rate unreasonableness to justify referral of this issue to the Commission.

Dillard also has requested this Court to refer the unreasonable practice and credit regulations issues to the Commission. By affidavit of Tim Walker, Dillard alleges that Plaintiff failed to timely rebill Dillard for loss of discount forfeitures within the ninety-day period within which such forfeitures must be asserted under the Commission's Credit Rules, 49 C.F.R. § 1320. Rather than billing Dillard within the ninety-day period, Plaintiff allegedly sent Dillard a revised freight bill for the forfeited amounts approximately one year after the shipments moved. Dillard also alleges that the loss of discount forfeiture is being claimed in the aggregate as to a large number of bills which had been issued over a period of

time, also in violation of the Credit Rules. The Court finds that Dillard has made a sufficient threshold showing that Plaintiff has violated the Commission's Credit Rules and has engaged in an unreasonable practice prohibited by the Act. Accordingly, these issues will be referred to the Commission, since they involve somewhat technical questions of fact and call for a determination that could be facilitated by the Commission's informed evaluation of the economics and practices of the motor common carrier industry. *Cf. Western Pacific*, 352 U.S. at 65 (stating that primary jurisdiction of an agency should be recognized when necessary to promote "uniform and expert administration of the regulatory scheme").

The Court's findings on whether Dillard has made sufficient threshold showings of rate unreasonableness, violation of Credit Rules, and unreasonable practices, are supported by the Commission's recent action in response to the petition filed by Dillard. Specifically, the Commission has found reason to order Plaintiff to show cause why a cease and desist order should not be issued prohibiting Plaintiff from collecting or attempting to collect more than previously billed discount rates on file with the Commission. *See* ICC Decision, No. MC-C-30197 (April 1, 1992).

Plaintiff cites the case of *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S. Ct. 1815 (1982), for the proposition that a carrier's non-compliance with the Commission's credit regulations is not a defense to a carrier's claim for payment of freight charges. However, *Commercial Metals* does not speak to the issue of whether a credit regulations issue may be referred to the Commission. Rather, *Commercial Metals* merely refused to permit a judicially-created affirmative defense based on violations of the Commission's credit rules. *See id.* 456 U.S. at 345-48, 102 S. Ct. at 1821-23 (noting that the Commission's silence and "public policy concerns disfavor judicial implication of affirmative de-

fenses based on carrier violations of the Commission's credit regulations."). The *Commercial Metals* Court left open the possibility that the Commission itself, in regulating this "highly technical field," *see id.* 456 U.S. at 350 n.11, 102 S. Ct. at 1824, could provide such an affirmative defense in the future. *See id.* 456 U.S. at 351, 102 S. Ct. at 1825 (stating that the "remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper.").

Referral of the unreasonable practice and credit violations issues to the Commission is also consistent with the views of the Third and Fifth Circuits, which have approved of the referral of similar issues to the Commission. See *Delta Traffic Service, Inc. v. Mennen Co.*, 919 F.2d 134 (1990) (unpublished decision); *Delta Traffic Service v. ADM of Mississippi*, 954 F.2d 721 (5th Cir. 1992) (unpublished decision). Furthermore, referral of these issues will not violate the filed rate doctrine, since there is no possibility of discrimination by a bankrupt carrier. Moreover, considerations of judicial and administrative efficiency strongly suggest that one forum should initially decide these issues. *See Advance United*, slip op. at 14 (stating that, where a court refers a rate unreasonableness issue to the Commission, interests of judicial economy militate in favor of referral of all issues relating to a carrier's collection suit). Because the Commission will be deciding Dillard's claim of rate unreasonableness, it simply makes sense to allow the Commission to also consider the other related issues raised by Dillard.

As for Plaintiff's motion for preliminary injunction, the Court will deny relief in all respects. In order to justify a preliminary injunction, Plaintiff must establish the following four factors: (1) a substantial likelihood of success on the merits; (2) a showing that Plaintiff will suffer irreparable injury if an injunction does not issue; (3) proof that the threatened injury to Plaintiff outweighs any harm that might result to Defendant; and,

(4) a showing that the public interest will not be disserved by a preliminary injunction. *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of America v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990). The Court finds that Plaintiff will not be irreparably harmed by referral of the rate issues to the Commission, and by stay of this case pending a decision by the Commission. Also, given that Plaintiff's position on the referral issue has been adopted by only the Fourth Circuit, in contrast to the numerous circuits which have approved of referral in appropriate circumstances, Plaintiff has not shown a substantial likelihood of success on the merits. Moreover, the public interest will not be disserved by having the Commission decide issues within its primary jurisdiction, nor does the threatened "harm" to Plaintiff by having to proceed before the Commission outweigh the harm which Defendant would suffer if an injunction were issued.

Finally, it should be noted that Plaintiff also contends that Defendant has violated the automatic stay of the bankruptcy court, 11 U.S.C. § 362, by initiating the proceeding before the Commission. However, because this Court will refer the issues raised by Defendant's affirmative defenses to the Commission, the issue of whether the automatic stay has been violated is moot. Plaintiff does not even attempt to argue that referral by this Court of these issues to the Commission would violate the automatic stay. Accordingly, it is now

ORDERED AND ADJUDGED:

1. Plaintiff's motion for order permitting Plaintiff to file a reply (docket no. 60) is granted. The Clerk is directed to docket Plaintiff's reply memorandum and the attached affidavit in the Court file.

2. Defendant's motion for leave to file reply (docket no. 61) is granted. The Clerk is directed to docket Defendant's reply memorandum and reply affidavit in the Court file.

3. Plaintiff's motion for preliminary injunction (docket no. 35) is denied.

4. Defendant's motion for stay and referral to ICC (docket no. 46) is granted. The following issues are hereby referred to the Interstate Commerce Commission for appropriate findings and determination:

> (A) Whether Plaintiff's action in attempting to collect loss of discounts as a credit penalty for late payment of freight bills of P*I*E Nationwide, Inc., a motor common carrier regulated by the Commission, violates the Commission's Credit Rules, 49 C.F.R. § 1320, and/or is an unreasonable practice in violation of the Interstate Commerce Act.
>
> (B) Whether, in the event the rates now claimed are determined to be applicable, those rates are unreasonable in violation of the Interstate Commerce Act.

Further proceedings in this action in this Court are hereby stayed pending completion of proceedings before the Commission. The Clerk shall deliver a certified copy of this Order to the Commission.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 30th day of July, 1992.

/s/ John H. Moore, Jr.
United States District Judge

APPENDIX B

AFFIDAVIT OF DON H. NORMAN

DON H. NORMAN, first being duly sworn, makes this affidavit in support of Lloyd T. Whitaker, Trustee for Olympia Holding Corp. f/k/a P*I*E Nationwide, Inc., and Fidelcor Business Credit Corporation.

1. Affiant has personal knowledge of the facts contained herein.

2. Affiant is President and Owner of Don H. Norman Associates, Inc. (DNA), whose executive office and principal place of business is located at Suite 1190, 8301 Greensboro Drive, McLean, Virginia 22102, and with additional offices maintained within the Interstate Commerce Commission Building, Room 4330, in Washington, DC.

3. Don H. Norman Associates is a transportation consulting firm specializing in rate and tariff research and rate information dissemination involving motor carriers and railroads. It also is engaged in the preparation and publication of tariffs for surface transportation companies. DNA compiles, publishes, and files thousands of tariff pages annually with the Interstate Commerce Commission ("ICC") and other regulatory agencies.

4. The research and watching service aspects of DNA are personally monitored and reviewed by Affiant. These services include the preparation of pricing initiatives and daily briefings to carrier and shipper interests from our office within the ICC building. Over the past 35 years, Affiant has had the opportunity to review and research virtually every conceivable type of tariff initiative filed with the ICC. Since the inception of DNA, Affiant has been involved in the rate research and tariff publishing activities of DNA.

5. Affiant has prepared and sponsored verified statements, affidavits, and testimony as an expert witness before the ICC and the courts.

6. As part of his duties, Affiant monitors pleadings and decisions filed with and released by the ICC each day for carriers, shippers and attorney interests with particular emphasis on issues involving the applicability of the filed-rate doctrine following the Supreme Court's decision in *Maislin Industries* v. *Primary Steel* in July 1990.

7. Attached, as Exhibit 1, is a current listing of 177 cases which I monitor closely on a daily basis. All or almost all of these cases involve the issue of rate reasonableness submitted to the ICC for a determination by the ICC. Most were filed at the ICC after court referral of undercharge claims by trustees of bankrupt motor carriers. As can be seen, some date back to 1985 and 1986.

8. As of this date, the ICC has not rendered a single deicsion determining the reasonableness of rates in any of these cases. The ICC's published decision in Docket 40233, *Eastman Kodak Company—Advance United Expressways, Inc.*, served July 12, 1991, 1991 Fed. Carr. Cas. (CCH) ¶ 37,928, was a rate-applicability case and made no rate-reasonableness determination, but in *dicta* it did suggest one possible measure of reasonableness where a rate is erroneously cancelled and then reinstated.

AND AFFIANT FURTHER SAYETH NOT.

VERIFICATION

DISTRICT OF)
) ss:
COLUMBIA)

Don H. Norman, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ Don H. Norman
DON H. NORMAN

Subscribed and sworn to me, a Notary Public in and for the County and State above named, this 8th day of May, 1992.

/s/ Kathleen Quinn

My Commission Expires
April 14, 1994
KATHLEEN QUINN
Notary Public
District of Columbia

EXHIBIT 1

Pre	Doc	Imp	D001X	Title
MCC	10961	R	3/22/1985	Primary Steel, Inc.—Maislin Industries, U.S. Inc. Etal
MCC	30007	R	8/26/1986	Auto Specialties Manufacturing Co. —GAF Corporation, Eta
MCC	30013	R	9/17/1986	A.J. Hollander Company Etal v. Maislin Industries Inc.
MCC	30025	R	1/16/1987	Manuf. Consolidation Service—Pet For Declaratory
MCC	30082	C	1/04/1988	Marine Lumber Co.—Weyerhauser Company
MCC	30095	R		General Mills, Inc.—Tobler Transfer Company
MCC	30105	R	5/27/1988	Ideal Chemical & Supply Co. v. Rebel Motor Freight, Inc.
MCC	30137	R	12/19/1988	B & B Beverage Co. v. Eazor Special Serevices, Inc.
MCC	30140	R	12/20/1988	Sunshine Mills, Inc.—Rebel Motor Freight, Inc. Etal
MCC	30156	R	3/06/1989	Ormond Shops, Inc. v. Oneida Motor Freight, Inc.
MCC	30164	N	5/10/1989	Milne Truck Lines, Inc.—Mark Services, Inc.
NOM	40232	C	5/25/1989	Honeywell, Inc.—Transportation Systems International, I
NOM	40233	R	5/30/1989	Eastman Kodak Company
NOM	40264	N	7/24/1989	Profit Freight Systems, Inc.
NOM	40265	N	7/24/1989	Georgia Pacific Corp.
NOM	40287	N	8/15/1989	Lowe's Companies, Inc.—Rebel Motor Freight, Inc.
NOM	40294	N	8/22/1989	Amtrol, Inc. v. American Freight System, Inc.
NOM	40299	C	8/30/1989	Lee Way
NOM	40316	C	9/21/1989	Lubrication Engineers, Inc.—Rates & Practices—Lee Way BOL
NOM	40322	N	9/26/1989	Trans-Allied Audit Company, Inc.
NOM	40325	C	9/25/1989	Midwest Air Freight Shippers Assn. Anco Products, Inc. Et
NOM	40331	N	10/10/1989	N. P. Express, Inc.—Unzicker Trucking, Inc.
NOM	40333	N	10/13/1989	Ferguson Perforating Wire & Co. —Petition for Declarat
NOM	40335	C	10/17/1989	Profit Freight Systems, Inc.—Priority Transfer, Inc.
NOM	40338	C	10/20/1989	Cole Well Corp Et Al—Pet. for Dec Order—Murphy Motor
NOM	40340	N	10/24/1989	Motorola, Inc.

Pre	Doc	Imp	D001X	Title
NOM	40348	C	11/06/1989	Commerce Express, Inc.—United Shipping Company, Inc
NOM	40350	C	11/08/1989	Twin Modal, Inc.
NOM	40360	N	12/06/1989	Senator Linie (USA), Inc. v. White Star Lines, Inc.
NOM	40367	N	12/21/1989	7/24 Freight Sales, Inc—Sharm Express, Inc.
NOM	40377	N	1/03/1990	P&O Containers (TFL) Ltd. v. C&H Nationwide
NOM	40380	N	1/05/1990	Curriculum Associates, Inc.
NOM	40383	C	1/09/1990	Wescar Freight Inc. v. Hussmann Corporation
NOM	40389	C	1/16/1990	Piedmont Carloading Service v. Sharm Express, Inc.
NOM	40398	C	2/14/1990	General Binding Corporation
NOM	40400	C	2/26/1990	Lubrication Engineers, Inc.—Advance—United Expressways
NOM	40405	C	3/06/1990	Spurrier Chemical Companies, Inc. —Advance United Expr
NOM	40415	C	3/21/1990	Sugar Creek Packing Company
NOM	40425	C	4/03/1990	Vertex Corporation v. Southwest Equipment Rental, Inc.
NOM	40435	C	4/24/1990	APPCO Paper and Plasatics Corp.—Delta Traffic Svc., I
NOM	40438	C	4/27/1990	BMC Industries, Inc.—James G. Duffy
NOM	40459	N	7/02/1990	The Woodbridge Group—Consolidated Freightways
NOM	40465	C	7/17/1990	Bemis Company, Inc.—Advance—United Expressways, Inc.
NOM	40470	N	8/02/1990	Reading Body Works, Inc. v. Rose-Way, Inc.
NOM	40474	C	9/05/1990	National Checking Company v. Transp. Systems Internatio
NOM	40480	N	9/24/1990	Reading Body Works, Inc.—Rose-Way, Inc.
NOM	40488	C	10/18/1990	Acme Steel Company v. Wenham Transportation, Inc.
NOM	40492	C	11/21/1990	Transtop, Incorporated v. Oneida Motor Freight, Inc., E
NOM	40500	C	1/07/1991	Norwest Publishing Co.—Milne Truck Lines, Inc.
NOM	40501	N	1/09/1991	Saver Company, Inc.—A-Line Ltd.
NOM	40505	N	1/16/1991	Chestnut Display Systems v. Yowell Transportation Servi
NOM	40507	N	1/18/1991	Admiral Transportation, Inc.
NOM	40509	C	1/23/1991	Maxell Corporation of America, Inc. —Advance—United Expr

NOM	40512	C	2/07/1991	Brown-Strauss Steel, Inc.—Cross-E Transportation, Inc
NOM	40514	C	2/13/1991	Armstrong World Industries, Inc.—Southwest Equipment
NOM	40515	C	2/19/1991	Gantrade Corporation v. Ritter Transportation, Inc.
NOM	40516	C	2/20/1991	The BFGoodrich Company—Freightcor Services, Inc.
NOM	40517	C	2/20/1991	CVN Companies, Inc. v. United Shipping Company, Inc.
NOM	40524	C	3/19/1991	Anchor Glass Container Corp.—Horn's Motor Express
NOM	40534	C	4/02/1991	SEAPAC Services, Inc. Pennco Trucking, Inc.
NOM	40541	C	4/09/1991	W. W. Grainger, Inc. v. United Shipping Company, Inc.
NOM	40559	N	4/30/1991	Ragland-Borg Corporation— Lifschultz Fast Freight, Inc.
NOM	40585	C	5/09/1991	W. R. Grace & Company v. Overland Express, Inc.
NOM	40586	C	5/10/1991	Mass Merchandisers, Inc. v. Freight-Cor Services, Inc.
NOM	40587	N	5/15/1991	General Chemical Corporation v. A-Line, Ltd.
NOM	40594	C	6/06/1991	Brody Associates, Inc.-Rose Way, Inc.
NOM	40598	C	6/10/1991	American Distribution Management, Inc. v. Southwest Equip.
NOM	40599	C	6/11/1991	Friedman Bag Company, Inc. v. A.T.F. Trucking Company
NOM	40602	C	6/17/1991	Menasha Corporation & M. T. Rogers Co. v. United Shippin
NOM	40605	C	6/25/1991	Kuhlman Corporation v. Freightcor Services, Inc.
NOM	40607	C	6/26/1991	Asset Transportation—Rates & Practices—Hagen, Inc.
NOM	40608	C	6/27/1991	Manville Products Corp—Rates & Practices—Express Transp
NOM	40610	C	7/01/1991	Southwire Company v. Freightcor Services, Inc.
NOM	40615	N	7/15/1991	All-Luminum Products Co., Inc. v. A-Line Ltd.
NOM	40619	N	7/16/1991	Thomasville Furniture Industries v. Dietz Motor Lines.
NOM	40623	C	7/26/1991	A. Kush & Associates—Rates & Practices—Lifschultz Fast
NOM	40631	C	7/31/1991	Exxon Chemical Americas v. A.T.F. Trucking Company, In
NOM	40633	C	8/01/1991	Coyle Strping & Supply—Rates & Practices—True Transport

Pre	Doc	Imp	D001X	Title
NOM	40640	C	8/09/1991	Have A Portion, Inc. v. Total Transportation, Inc.
NOM	40642	C	8/12/1991	Quality Fasteners Co., Inc. v. A-Line, Ltd.
NOM	40643	C	8/12/1991	J Sugihara Trading of California v. A-Line, Ltd.
NOM	40645	C	8/15/1991	J.E.B. Enterprises, Inc. v. Best Refrigerated Express
NOM	40646	C	8/16/1991	Hudson-Thompson, Inc. v. Silver Fleet Express, Inc.
NOM	40647	C	8/16/1991	Scrivner, Inc.—Rates & Practices—Silver Fleet Express
NOM	40648	N	8/15/1991	Viking Office Products, Inc. v. Brown Transport, Corp.
NOM	40658	C	8/27/1991	Co-Operative Shippers, Inc. v. Old Dominion Freight Lin
NOM	40660	C	9/03/1991	Eaton Corporation v. A-Line, Ltd.
NOM	40667	N	9/18/1991	The Okonite Company v. C & H Nationwide, Inc.
NOM	40668	N	9/20/1991	The Crowell Corporation vs. A-Line Ltd.
NOM	40669	C	10/01/1991	Ram Trans, Inc. v. Rose Way, Inc.
NOM	40672	C	10/07/1991	Ampad Corporation—Branch Motor Express
NOM	40673	C	10/15/1991	Midwest Air Freight Shippers Assoc. v. Sharm Express, I
NOM	40675	C	10/22/1991	Twin Modal, Inc. Twin Continental, Inc.
NOM	40676	C	10/24/1991	American Distribution—Rates & Practices—Best Refrigerat
NOM	40677	C	10/24/1991	Midwest Carriers Corp—Rates & Practices—Best Refrigera
NOM	40678	C	10/24/1991	Productive Transportation—Rates & Practices—Best Refrig
NOM	40680	C	11/04/1991	Lynn Transportation—Rates & Practices—Best Refrigerated
NOM	40681	C	11/04/1991	Sipco, Inc.—Rates & Practices—Best Refrigerated
NOM	40682	C	11/04/1991	R.D. Industries, Inc.-Silvey Refrigerated Carriers, Inc.
NOM	40683	C	11/04/1991	Cook Family Foods Ltd.-Best Refrigerated Express, Inc.
NOM	40684	C	11/04/1991	Cook Family Foods Lts—Rates & Practices—Silvey Refrigerat
NOM	40685	C	11/04/1991	Conagra, Inc.-Wheelers Group—Silvey Refrigerated
NOM	40686	C	11/04/1991	Conagra, Inc. (N. States Beef)-Rates Silvey Refrigerated

NOM	40687	C	11/12/1991	Anchor Glass et al—Rates & Practices—Freightcor Service
NOM	40689	C	11/18/1991	Topco Associates—Rates & Practices F. P. Transportatio
NOM	40690	C	11/19/1991	American Trading & Production-Rates & Practices-A-Line Lt
NOM	40691	C	11/17/1991	Best Refrigerated Express v. GS Brokerage, Inc.
NOM	40695	C	11/25/1991	Atlantis Express, Inc. v. Twin Modal, Inc.
NOM	40696	C	11/29/1991	S.O. Textil Co.—Rates & Practices—Brinke Transportati
NOM	40698	C	1/06/1992	Display Unlimited—Rates & Practices—Brinke Transporta
NOM	40699	C	1/06/1992	J. M. Bass, Inc.—Rates & Practices—Binke Transportat
NOM	40700	C	11/29/1991	Panasonic Company—Rates & Practices—Motor Freight Lin
NOM	40701	N	12/02/1991	O.C. Adhesives Corp.,-Et. Al v. Ancar Transport Inc.
NOM	40702	C	12/02/1991	Alan Tracey, Inc. v. Brinke Transportation Corp.
NOM	40704	C	11/29/1991	LA Preferida, Inc.—Rates & Practices—Santa Fe Trail
NOM	40705	C	12/06/1991	Eastman Kodak Company v. Ambassador Factors Division
NOM	40706	C	12/06/1991	E. A. Miller, Inc.—Best Refrigerated Express, Inc.
NOM	40707	C	12/09/1991	International Multifoods Corporation v. Ambassador Facto
NOM	40708	N	12/09/1991	Farah U.S.A., Inc. and Farah Manufacturing, Inc. v AAA
NOM	40710	C	12/10/1991	Trans America Trucking, Inc. v Best Refrigerated Express
NOM	40713	C	12/12/1991	Intermetro Industries Corporation—Zurek Express, Inc.
NOM	40714	C	12/12/1991	American National Can Company—M. T. I. Transport, Inc.
NOM	40715	C	12/12/1991	Martha White Foods—Rates & Practices—Unsicker Truckin
NOM	40716	C	12/16/1991	Johnson Truck Brokers—Bankruptcy Estate of Murphy Mot
NOM	40718	C	12/17/1991	Rocky Mountain Express Corp.—Best Refrigerated Expres
NOM	40719	C	12/20/1991	Marathon Agents, Inc.—Rates & Practices-Best Refrigera
NOM	40720	C	12/20/1991	Sumark Services-Rates & Practices-Best Refrigerated Ex
NOM	40721	C	12/20/1991	Delta Plastics, Inc.-Rates & Practices Best Refrigera

Pre	Doc	Imp	D001X	Title
NOM	40722	C	12/20/1991	Brown Packing Company-Rates & Practices-Best Refrigerat
NOM	40723	C	12/20/1991	Green Bay Packaging, Inc.-Murphy Motor Freight Lines, I
NOM	40724	C	12/20/1991	New England Pottery Co., Inc. Rates & Practices-Crest
NOM	40725	C	1/02/1992	Hi-Country Lame Co.—Best Refrigerated Express, Inc.
NOM	40726	C	12/23/1991	Century Transportation, Inc.—Best Refrigerated Express
NOM	40728	C	1/02/1992	Scheduled Transportation, Inc.—Best Refrigerated Expr
NOM	40729	C	1/02/1992	Sara Lee Corporation—Best Refrigerated Express, Inc.
NOM	40730	C	12/27/1991	Valmont Industries, Inc.—Rose-Way, Inc.
NOM	40731	C	12/27/1991	Berger and Company—Rose-Way, Inc.
NOM	40733	N	1/06/1992	Steinbach, Inc. v. Lifschultz Fast Freight, Inc.
NOM	40734	N	1/07/1992	Acme Manufacturing Co. v. Colonial Fast Freight Lines,
NOM	40735	N	1/09/1992	Fisk Alloy Wire, Inc. v. Lifschultz Fast Freight, Inc.
NOM	40738	N	1/27/1992	Admiral Transportation, Inc. v. F. P. Corp.
NOM	40739	C	1/27/1992	Georgia-Pacific Corporation—IMFS, Inc.
NOM	40740	N	1/29/1992	Acme Cutrate, Inc.—Penerex Carpet Services, Inc.
NOM	40741	N	1/30/1992	Gulf States Paper Corp. v. Hawkeye Refrigerated Services
NOM	40742	C	1/30/1992	Beloit Corporation and Rice Lake Bearing, Inc. v Freigh
NOM	40743	C	1/31/1992	Taurus Food Producs, Inc. v. Emporia Motor Freight
NOM	40747	C	2/12/1992	Freudenberg Nonwoven-Crest Truck Lines, Inc.
NOM	40748	C	2/13/1992	Blue Star Foods, Inc.—Freightcor Services, Inc.
NOM	40749	C	2/14/1992	Big T Transfer, Inc.—Best Refrigerated Express, Inc.
NOM	40750	C	2/18/1992	FTR Transport, Inc.—Thomas F. Hoarty, Jr. for Best Re
NOM	40751	N	2/19/1992	Dillard Department Stores, Inc.—Fidelcor Business Cre
NOM	40752	C	2/18/1992	Joseph L. Novak—Best Refrigerated Express, Inc.

NOM	40753	C	2/18/1992	Best Refrigerated Express, Inc. v. C. H. Robinson Compa
NOM	40754	C	2/21/1992	Madison Industries Inc.—Ricter Transportation, Inc.
NOM	40755	C	2/24/1992	Rose Day, Inc. v. Roberts & Dybdabl Inc.
NOM	40756	N	2/24/1992	Ball Transport, Inc—Continental Carrier Corp. & MFC
NOM	40757	C	2/28/1992	Jeffrey L. Moore, DBA-Quest Transp. v. Roseway, Inc.
NOM	40758	C	2/28/1992	Ralph Herring, DBA-Kustom Transport v. Roseway, Inc.
NOM	40759	N	3/02/1992	Evergreen America Corp. vs Bowman Transportation, Inc.
NOM	40760	C	3/02/1992	California Enterprises Consolidated, Inc. v. Roseway, Inc.
NOM	40761	C	3/02/1992	Waymouth Farms, Inc. v. Advance-United Expressways, Inc
NOM	40763	C	3/02/1992	Holtzman's Little Folk Shop, Inc's.—Lifschultz Fast F
NOM	40765	C	3/09/1992	Best Refrigerated Express, Inc.—James Fleming Truckin
NOM	40766	C	3/10/1992	Freight Agency, Inc. v. Rose-Way, Inc.
NOM	40767	C	3/11/1992	Gutchess Lumber Company, Inc., et al.—Canny Trucking C
NOM	40768	C	3/13/1992	Greg Orschelin Transportation v. Best Refrigerated Expr
NOM	40769	C	3/13/1992	Bennett Transportation v. Best Refrigerated Express, In
NOM	40770	C	3/13/1992	Ralph Godic v. Best Refrigerated Express, Inc.
NOM	40771	C	3/13/1992	U.S. Comex Corporation v. Best Refrigerated Express,
NOM	40772	N	3/13/1992	American Lockers Security—DDF Transportation et al.
NOM	40775	C	3/18/1992	Wyandot, Inc.—Thomas M. Mullinex
NOM	40778	C	3/26/1992	Domtar Gypsum, Inc.—Rose-Way, Inc.
NOM	40779	C	3/27/1992	General Management, Inc.—Best Refrigerated Express, I
NOM	40789	C	4/16/1992	Standard Transp. Services, Inc.—Atlantis Express, Inc.
NOM	40790	C	4/17/1992	Conagra, Inc.—Unzicker Trucking, Inc.
NOM	40792	C	4/24/1992	Vantran Electric Inc.—Rose-Way, Inc.
NOM	40793	C	4/30/1992	Basins, Inc.—Northeast Carrier, Inc.

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case Nos. 90-4195-BKC-3P7 and
90-4223-BKC-3P7

Jointly Administered

Adv. No. 91-448

IN RE OLYMPIA HOLDING CORPORATION,
a/k/a P-I-E NATIONWIDE, INC., *et al.*,
Debtors.

LLOYD T. WHITAKER AS CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING CORPORATION,
a/k/a P-I-E NATIONWIDE, INC.,
Plaintiff,

v.

YOUNKERS, INC., a Delaware corporation,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

Upon the Findings of Fact and Conclusions of Law separately entered, it is

ORDERED:

Defendant's Motion for Referral to the Interstate Commerce Commission is denied.

DATED: June 15, 1992, in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case Nos. 90-4195-BKC-3P7 and
90-4223-BKC-3P7

Jointly Administered
Adv. No. 91-448

IN RE OLYMPIA HOLDING CORPORATION,
a k a P-I-E NATIONWIDE, INC., *et al.*,
Debtors.

LLOYD T. WHITAKER AS CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING CORPORATION,
a k a P-I-E NATIONWIDE, INC.,
Plaintiff,

v.

YOUNKERS, INC., a Delaware corporation,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This adversary proceeding came to be heard upon the Motion of Defendant for Referral to the Interstate Commerce Commission. A hearing was held on December 13, 1991. Upon the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

Debtor was both a motor common and motor contract carrier operating in interstate commerce pursuant to the

authority of the Interstate Commerce Commission ("ICC").

Debtor filed tariffs with the ICC which provided for a Class 70 exception rate with a discount of 55-59% off of that Class 70 exception rate. Subsequent to the filing of such tariff rate, debtor filed tariff item 721 stating that any customer not paying its bill within 60 days of the date of the invoice would lose its class exception and its discount ("loss-of-discount tariff").

Debtor filed a chapter 11 petition on October 16, 1990. Lloyd T. Whitaker was appointed as chapter 11 trustee on December 26, 1990. The case was subsequently converted to chapter 7 on March 11, 1991, and Lloyd T. Whitaker was appointed the chapter 7 trustee.

Defendant, as shipper, and Debtor, as common carrier, did business together on a tariff basis for a substantial amount of time.

In late November and early December of 1990, a dispute arose between debtor and defendant. Defendant claimed approximately $14,000.00 against debtor for goods lost or damaged in shipment and withheld payment on the shipping bills.

Plaintiff conducted an audit of debtor's records and determined that the original amounts billed were not properly rated in accordance with the filed tariff. Accordingly, the plaintiff sent new bills to defendant which did not include the class exception or the discount and which were rerated at the full class rates. The rerated bills represented an increase in rates from the original bills of at least 65-69%. Plaintiff based the change on the loss-of-discount tariff. Defendant refused to pay the rerated bills.

On June 20, 1991, plaintiffs filed this adversary proceeding seeking turnover of property and a money judgment for $31,516.48, based on the rerated bills. Defendant filed an answer raising the defenses of set-off and

unreasonable rates and asked that the proceeding be referred to the ICC. With plaintiff's consent, defendant later filed an amended answer asserting further defenses, as well as a counterclaim for damages.

Defendant contends that 1) the tariff rates on which plaintiff relies are inapplicable to the shipments in question; 2) if the rates do apply, they are unreasonable and unlawful under 49 U.S.C. § 10701(a); 3) the tariff rules violate 49 U.S.C. 10761 and ICC regulations contained in 49 C.F.R. Part 1320; and 4) some sums sought by plaintiff were not demanded until after the requisite time periods of 49 C.F.R. parts 1320.2(e)(2) and (3), 1320.2(g)(2)(vi).

Plaintiff, on the other hand, argues that 1) this Court does not have jurisdiction under 28 U.S.C. § 1336(b) to make a referral to the ICC; 2) referral is not necessary because defendant must pay the filed rate and then seek reparations; 3) the loss-of-discount tariff does not violate ICC credit regulations, and 4) violation of the credit regulations is not a defense to enforcement of filed tariff rates.

Thus, the Court must initially determine whether it has the authority under 28 U.S.C. § 1336 to refer any issue to the ICC. If the Court does have such power, the question arises as to whether the issues raised in this proceeding must be resolved by the administrative agency and if so, at what point in time must such a determination be made.

Conclusions of Law

A. Referral Power

Congress provided in 28 U.S.C. § 1334(b) that ". . . district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Under 28 U.S.C. § 157(a), the district court may provide that any

or all cases or proceedings arising under title 11 shall be referred to the bankruptcy judges. The United States District Court for the Middle District of Florida has entered such a referral order. Rule 104, Local Rules for the Middle District of Florida. Accordingly, this bankruptcy case and this adversary proceeding have been referred to this Court.

The district court's jurisdiction to refer issues to the ICC is embodied in 28 U.S.C. § 1336, which provides in relevant part:

> (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.
>
> (b) When a district court or the United states Claims Court refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

Under the district court's referral order, the bankruptcy court is sitting in the adversary proceeding as a unit of the district court. Thus, for purposes of 28 U.S.C. § 1336, "district court" includes the bankruptcy court. *Railway Labor Executives' Assn v. ICC*, 894 F.2d 915 (7th Cir.) *reh'g denied*, 908 F.2d 127 (7th Cir. 1990); *In re Total Transportation, Inc.*, 84 B.R. 590 (D.Minn. 1988). Accordingly, this Court has jurisdiction to refer the issues at hand to the ICC.

It should also be noted that although his brief argues to the contrary, plaintiff's counsel stated during the hearing that this Court has "the power to refer matters to any federal agency, including the ICC." (Transcript at page 9).

B. Primary Jurisdiction

The doctrine of primary jurisdiction serves to ensure that the courts provide administrative agencies charged with specific regulatory responsibilities the appropriate opportunity to fulfill such duties. The United States Supreme Court explained the doctrine:

> "Primary jurisdiction," . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . .
>
> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

United States v. Western P. R. Co., 352 U.S. 59, 63-64 (1956) (citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)). The Court then indicated that the doctrine was intended to promote uniformity and consistency, as well as provide expert and specialized knowledge when resolving administrative questions. *Id.; Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

The issues in this proceeding primarily involve the valadity of the loss-of-discount tariff and the reasonableness of the filed rate. In *Western P. R. Co.* the Court also indicated that where the issue merely involved construction

of a tariff, courts could decide it as an issue "solely of law." *Western P. R. Co.*, 352 U.S. at 66. Thus, as long as discretion in technical matters requiring a knowledge of intricate facts is not being exercised, a court may decide the issues.

The Court of Appeals for the Seventh Circuit has held that ". . . courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness." *Interstate Commerce Com. v. All-American, Inc.*, 505 F.2d 1360, 1363 (7th Cir. 1974).

The defendant contends that the loss-of-discount tariff if unlawful because it does not comply with the ICC credit regulations. Plaintiff argues that the credit regulations are irrelevant and that the loss-of-discount tariff is merely a condition precedent to participation in the discount programs. Accordingly, the issue involves either a violation of regulations or tariff interpretation, both of which are within the original jurisdiction of this Court.

The Supreme Court has indicated that jurisdiction to determine the reasonableness of rates is vested with the ICC: "'The [Interstate Commerce) Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.'" *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, ——, 110 S. Ct. 2759, 2767 (1990) (quoting *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 384 (1932)). The question of the reasonableness of debtor's filed rates should be properly decided by the ICC.

Both the parties admit that the ICC is the expert body vested with the authority to resolve a legitimate issue of rate reasonableness. However, the parties differ on their assessment as to when such a determination is properly made.

C. Rate Reasonableness

Currently the Circuit Courts of Appeal are split on the issue of when the ICC should determine whether a filed rate is reasonable. The first, third, seventh, and eighth circuits adhere to the stay and refer approach. *Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd*, 919 F.2d 134 (3rd Cir. 1990); *Western Transportation Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982); *Atlantis Express, Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529 (8th Cir. 1992). Those circuits hold that the judicial proceeding must be stayed and the issue of rate reasonableness referred to the ICC for determination. In so holding the cases necessarily recognize rate reasonableness as a defense to a proceeding to collect the filed rate.

The fourth and fifth circuits, on the other hand, hold that rate reasonableness cannot be used as a defense. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989). The cases indicate that the shipper must pay the filed rate and then the exclusive remedy for recovering excess charges is through the statutory reparations action. At that time the ICC would determine the reasonableness of a given rate.

Neither the District Court for the Middle District of Florida nor the Court of Appeals for the Eleventh Circuit has spoken on this issue. This Court finds that the rationale behind the holdings in the fourth and fifth circuits is more persuasive and, thus, holds that rate reasonable is not properly asserted as defense to collection of the filed rate.

Prior to the enactment of the Motor Carriers Act of 1935, common law recognized a shipper's right to restitution for unreasonable charges. *Arizona Grocery Company v. Atchison, T. & S. F. R. Company*, 284 U.S. 370 (1932); *Arkadelphia Milling Company v. St. Louis S. R. Co.*, 249 U.S. 134 (1919). Subsequent to such enactment, it was assumed that the savings clause, 49 U.S.C. § 316(j),[1] provided the basis for a continued right of restitution.

However, the United States Supreme Court subsequently held that the restitution remedy afforded shippers under common law had not survived. *T. I. M. E. Incorporated v. United States*, 359 U.S. 464 (1959). In holding that a shipper could not challenge the reasonableness of a rate in post-shipment litigation, the Court left shippers without any remedy when a filed rate was found to be unreasonable.

Congress recognized the problem and enacted 49 U.S.C. § 304a in 1965 in an effort to provide shippers with relief. Section 304a provided that shippers could recover overcharges by filing an action at law for "reparations" within a certain time period. The section specifically defined reparations as damages resulting from charges based on a tariff found to be unreasonable by the ICC. Section 304a has since been recodified as 49 U.S.C. §§ 11705(b)(3) and 11706(c)(2), which read, in relevant part:

> § 11705. Rights and remedies of persons injured by certain carriers.
>
> (b)(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV or chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

---

[1] Section 316(j) provides: "Nothing in this section shall be held to extinguish any remedy or right of action; not inconsistent herewith."

§ 11706. Limitation on actions by and against common carriers.

(c)(2) A person must begin a civil action to recover damages under section 11705(b)(3) of this title within 2 years after the claim accrues.

The statute, by its terms, provides a procedure through which a shipper may challenge a filed rate and recover "reparations" for excessive amounts paid. The scheme does not provide for the use of the right to reparations as a defense. The sole and exclusive remedy provided is a post-payment challenge to the rate reasonableness accompanied by a request for reparations. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989); *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1085 (5th Cir. 1974); *Lifschultz Fast Freight, Inc. v. Rainbow Shops, Inc.*, 784 F.Supp. 89, 93 (S.D.N.Y. 1992) ("The very characterization of the remedy in the statute—'reparations'— suggests a rule of pay first and sue later.").

Rejection of reasonableness as a defense may lead to a harsh result, but it is the result dictated by the terms of the statute. In addition, it serves to support the filed rate doctrine espoused by the United States Supreme Court:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N. R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). The Supreme Court recently reiterated the importance of the filed rate doctrine in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, ——, 110 S.Ct. 2759, 2766-67 (1990).

By refusing to allow the defendant to assert rate reasonableness as a defense the Court not only adheres to the statutory scheme, but also protects the filed rate doctrine and its underlying policy of discouraging price discrimination.

D. Conclusion

This Court has the jurisdiction to refer the issues raised to the ICC, but concludes that such referral is inappropriate at this time. Although the ICC has primary jurisdiction over rate reasonableness questions and is the proper body to make such determinations, rate reasonableness is not a defense to a proceeding to collect the filed rate. Defendant's sole remedy for excessive charges is through the statutory reparations action.

A separate order denying defendant's motion for referral to the ICC will be entered.

DATED: June 15, 1992, in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge